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Nos. 91-744 and 91-902

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.,
Petitioners/Cross-Respondents

v.

ROBERT P. CASEY, et al.,
Respondents/Cross-Petitioners

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENTS

ERNEST D. PREATE, JR.
Attorney General

BY: JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section
Counsel of Record

KATE L. MERSHIMER
Senior Deputy Attorney General

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act:

a. 18 Pa. Cons. Stat. Ann. Sec. 3203 (definition of medical emergency)

b. 18 Pa. Cons. Stat. Ann. Sec. 3205 (informed consent)

c. 18 Pa. Cons. Stat. Ann. Sec. 3206 (parental consent)

d. 18 Pa. Cons. Stat. Ann. Sections 3207, 3214 (reporting requirements)?

2. Did the court of Appeals err in holding 18 Pa. Cons. Stat. Ann. Sec. 3209 (spousal notice) unconstitutional?

LIST OF PARTIES

Petitioners in No. 91-744 (respondents in No. 91-902) are Planned Parenthood of Southeastern Pennsylvania; Reproductive Health and Counseling Center; Women's Health Services, Inc.; Women's Suburban Clinic; Allentown Women's Center; and Thomas Allen, representing himself and a class of similarly situated physicians.

Respondents in No. 91-744 (petitioners in No. 91-902) are Robert P. Casey, the Governor of Pennsylvania; Allan S. Noonan, Acting Secretary of the Pennsylvania Department of Health[1]; and Ernest D. Preate, Jr., the Attorney General of Pennsylvania.

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[1]Substituted for former Secretary of Health N. Mark Richards, see Sup. Ct. R. 35.3.

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The opinion of the Court of Appeals is reported at 947 F.2d 682 and is reprinted at 1a.[2] The opinion of the District Court is reported at 744 F. Supp. 1323 and is reprinted at 104a.

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[2]Citations to "___a" are to the Appendix to the Petition for Certiorari in No. 91-744.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1991. Petitioners and respondents both filed petitions for certiorari within 90 days thereafter, and the Court granted both petitions, limited to the questions set forth above, on January 21, 1992. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment's Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amend. XIV, § 1.

2. The relevant provisions of the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. §§ 3201 through 3220, are reprinted at 289a-304a, except for the Act's severability clause, which is uncodified and reads as follows:

> The provisions of this Act are severable. If any word, phrase or provision of this Act or its application to any person or circumstance is held invalid, the invalidity shall not affect any other word, phrase or provision or application of this Act which can be given effect without the invalid word, phrase, provision or application.

Act of Nov. 17, 1989, P.L. 592, No.64, § 6.

STATEMENT OF THE CASE

This action challenges the constitutionality of amendments enacted in 1988 and 1989 to Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. §§ 3201-3220 (1990). Petitioners, five abortion facilities and a class of physicians who provide abortions, J.A. 42-43 (order certifying class), sought declaratory and injunctive relief against a wide array of the 1988 and 1989 amendments. The challenged provisions regulate but do not prohibit abortions. The one provision of the Act which does contain an outright prohibition, § 3204(c)(no abortion to be performed solely because of the sex of the unborn child), was not challenged.

I. PROCEDURAL HISTORY

The United States District Court for the Eastern District of Pennsylvania

issued a preliminary injunction against certain provisions of the Act before their effective date. J.A. 72-73 (order).

After a bench trial, the District Court issued a permanent injunction granting petitioners virtually all the relief they had requested. The District Court enjoined implementation of provisions of the Act relating to informed consent, parental consent for abortions on minors, spousal notification, public disclosure of certain reports, and the collection of certain other information. 238a-262a, 266a-279a, 285a-287a. In addition, the District Court enjoined implementation of all provisions of the Act that contain an exception for medical emergencies on the ground that that exception was inadequate. 235a-237a,

286a. Respondents appealed.[3]

The Court of Appeals largely reversed the District Court, the three-judge panel unanimously holding most of the challenged provisions of the Act constitutional. 1a-86a. The sole exception was the spousal notice provision, on which the panel divided. The two judges of the majority held this provision unconstitutional, 60a-80a, while the dissenting judge, believing the spousal notice provision to be constitutional, would have reversed the District Court on this point as well. 96a-103a.

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[3] Petitioners had asked the District Court to enjoin the collection of virtually all information on abortions, and to enjoin the Act's requirement that the gestational age of the unborn child be ascertained, but the District Court was unwilling to go so far. 263a-266a, 269a-279a. These were the only respects in which the petitioners were unsuccessful in the District Court, and they did not appeal.

To ascertain the correct standard of review, the Court of Appeals turned for guidance to Marks v. United States, 430 U.S. 188 (1977). 20a-21a. Applying the principles of Marks to the Court's fragmented decisions in Webster v. Reproductive Health Services, 492 U.S. 490 (1989) and Hodgson v. Minnesota, 110 S.Ct. 2926 (1990), the Court of Appeals identified Justice O'Connor's concurring opinions in Webster and Hodgson as embodying the controlling standard of those cases. That standard, which the Court of Appeals called the "undue burden" standard, "appl[ies] strict scrutiny review to regulations that impose an undue burden [on the right to abortion] and rational basis review to those which do not." 30a.

Applying this undue burden standard to Pennsylvania's Abortion Control Act,

the Court of Appeals held that except for the spousal notice provision, none of the challenged provisions imposed an undue burden and all had some rational basis on their face.[4] 32a-85a.

II. FACTS

Despite what the petitioners say, Br. for Cross-Respondents, No. 91-902, at 3 n.4, the respondents did challenge the District Court's findings of fact on appeal, and continue to do so here.[5] Many of the District Court's errors were of

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[4] Because the Act has never been allowed to go into effect, the petitioners' attack on it could only be a facial one.

[5] Again despite what the petitioners say, Pet. Br. at 4 n.6, the Court of Appeals held that some of these findings were unsupported by the record, 38a-40a, 79a-80a, 83a, while others were insufficient to establish the statute's unconstitutionality under the more deferential standard of review the Court of Appeals employed. E.g., 46a, 49a, 51a, 53a-54a, 78a.

omission. The following discussion therefore relies not only on the District Court's findings, but also upon facts which, although omitted by the District Court, were either admitted by the petitioners or testified to by witnesses whom they called and whom the District Court found "credible in all respects." 115a, 117a-122a.

A. The Definition of Medical Emergency.

In cases of medical emergencies, defined in Section 3203 of the Act, compliance with a number of the Act's requirements is excused.[6] A medical emergency is:

> that condition which, on the

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[6] Medical emergencies permit physicians and women to forego the requirements concerning determination of gestational age, §3204; informed consent, §3205; parental consent, §3206; spousal notification, §3209; and conditions placed on third trimester abortions, §3211(c).

> basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

Id.

The petitioners contended that this definition was too narrow, and the evidence centered around three medical conditions--preeclampsia, inevitable abortion, and premature ruptured membrane--which the petitioners claimed required immediate termination of pregnancy and yet would not fall within the Act's definition of a medical emergency.[7]

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[7]The petitioners' witness Dr. Bolognese, who is certified as a specialist by the American College of Obstetricians and Gynecologists (ACOG), 121a-122a, was asked on cross-examination if there were any other such situations.

The expert witnesses called by both sides agreed that preeclampsia places the patient at risk of liver and kidney destruction, eclampsia (a seizure disorder of the brain), cerebral hemorrhage, and respiratory distress, all leading to death. J.A.195-196, 201-202 (testimony of Dr. Bolognese), 332-335 (testimony of Dr. Bowes). Inevitable abortion can cause severe hemorrhaging, leading to shock, infection and death. J.A. 120-126 (testimony of Dr. Davidson), 331-332 (testimony of Dr. Bowes). Premature

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He could identify only two: a patient with severe and uncontrolled hypertension, or with severe and uncontrolled diabetes. He testified that if these pregnancies are not terminated, the hypertensive patient could "stroke out" and suffer permanent paralysis or die, while the diabetic patient faces a diabetic coma or diabetic seizures. J.A. 198-199. The petitioners did not rely on either of these scenarios in the courts below, and indeed it seems obvious that both are medical emergencies within the meaning of Section 3203.

ruptured membrane can produce an overwhelming sepsis, loss of the ability to clot blood, hemorrhaging, shock and death. J.A. 190-195, 200-201 (testimony of Dr. Bolognese), 335-336 (testimony of Dr. Bowes). In fact, these conditions are three of the major causes of maternal death in the United States. J.A. 195 (testimony of Dr. Bolognese).

B. Informed Consent

The Act's informed consent provisions require that, twenty-four hours before an abortion, a physician provide the pregnant woman with medical information on the risks and alternatives to abortion, the gestational age of the unborn child, and the risks of carrying to term. In addition, either a physician or counselor must advise the woman of possible childbirth and paternal support benefits, and the availability of printed materials

concerning fetal development and agencies offering alternatives to abortion. 18 Pa. Cons. Stat. §§3205(a), 3208.

All of the petitioners currently do inform their patients of the risks and alternatives to abortion, using standardized forms and rote recitations. 134a, 138a; J.A. 398 (counseling guidelines), 410 (consent form), 449, 451-456 (procedure manual), 461-463 (disclosure form), 479-482 (consent form). One of the petitioners processes patients in groups of four, 134a, and two of them use consent forms whose wording is identical to that of § 3205(a)(1)(i). J.A. 464, 469 (consent forms). All of the petitioners likewise determine the gestational age. J.A. 105 (stipulation); and two of them advise all women, regardless of circumstances, of the risks of carrying to term. J.A. 449, 455-456

(procedure manual), 461 (disclosure form).

To convey this information, the petitioner clinics rely on counselors rather than physicians. These counselors are often part-time employees paid $15,000 or less per year. J.A. 109 (stipulation), 537 (testimony of Sherley Hollas).[8] Most of the petitioners have no minimum educational requirements for these counselors, 149a, J.A. 109-110 (stipulation), 524 (testimony of Sue Roselle), 529 (testimony of Carol Wall),[9] who are not qualified to answer questions on, for example, fetal development. J.A. 266-267 (testimony of Sue Roselle). The

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[8]Hollos is executive director of petitioner Women's Suburban Clinic. J.A. 532.

[9]Roselle is executive director of petitioner Women's Health Services, 117a; Wall is executive director of petitioner Planned Parenthood of Southeast Pennsylvania. Defendants' Exhibit 56, p. 7.

petitioners produced no evidence that quantified what the effect would be upon the cost or availability of abortions if this information were to be conveyed by physicians, as § 3205 requires, rather than by counselors.

In addition to conveying the medical information just discussed, most petitioners also require counselors to provide "options counseling" to women about the alternatives to abortion. 49a, 138a, 142a, 146a-147a; J.A. 393, 398, 410, 448, 461, 469, 474 (forms, guidelines, procedure manuals). The clinics either offer, or provide upon request, information and referrals on fetal development (including photographs), financial support, medical assistance benefits, and agencies providing an alternative to abortion. J.A. 153 (testimony of petitioner Allen), 257-258,

267-68 (testimony of Sue Roselle), 401-405, 444-447, 458-459, 474 (forms, guidelines, procedure manuals).

As to the 24-hour waiting period, the evidence showed that a delay as short as this adds no measurable risk to the abortion procedure. J.A. 136 (testimony of petitioner Allen). In the first trimester, which is when 94% of abortions in Pennsylvania are performed, 150a, a delay of even a week results in no additional risk. J.A. 552 (Rule 36 admission by petitioners). Increases in risk are measurable only over spans of two to three weeks,and even then are very small. For example, if an abortion is delayed from the 9-10 week range to the 11-12 week range, the mortality rate rises from 0.8 per 100,000 to 1.1 per 100,000. 153a. Even in the 15th and 16th weeks, abortion is twice as safe as a

tonsillectomy and a hundred times safer than an appendectomy. 153a; J.A. 137 (testimony of petitioner Allen).

Some delay is already built into the petitioners' procedures. Most women make two trips to the abortion provider, once for a pregnancy test and once for the actual abortion. The petitioners will not even schedule an abortion until the patient has a positive pregnancy test, and the abortion is then scheduled within one to two weeks thereafter. 133a, 136a, 141a-142a, 146a; J.A. 87, 90-91, 95, 98 (stipulation). The petitioners encourage and sometimes require additional delays when a minor wishes to involve her parents, J.A. 105 (stipulation), when a woman appears ambivalent about her decision, J.A. 93, 96, 98-99, 104-105 (stipulation), and, in one case, when a woman expresses a "politically incorrect"

view on abortion. J.A. 486 (consent form), 546 (testimony of Sylvia Stengle).[10]

C. Parental Consent

In 1988, about 12% of the abortions in Pennsylvania were performed on minors under the age of 18. 150a. Section 3206 of the Act requires the informed consent of one parent for a minor who desires an abortion, but provides a judicial bypass option if the minor does not, or cannot, obtain a parent's consent. 18 Pa. Cons. Stat. § 3206.

All of the petitioners encourage minors to discuss their decision with their parents, and encourage parents to accompany their daughter to the abortion clinic. J.A. 105 (stipulation). One petitioner requires that all minors be accompanied by an adult, although not

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[10]Executive director of petitioner Allentown Women's Center. 118a; J.A. 541.

necessarily a parent. 135a. Between 50% and 60% of the minors whom petitioners see are in fact accompanied by one or more parents. 131a, 135a, 139a. In such cases, two of the petitioners require that both the parent and the child sign consent forms. 139a; J.A. 475 (counseling checklist). In addition, the hospital where petitioner Allen practices requires written parental consent before any minor has an abortion. J.A. 104 (stipulation).

D. **Spousal Notice**

Under Section 3209, a married woman who is about to undergo an abortion must notify her husband of her intention, unless her husband is not the father, or she cannot locate her husband, or the pregnancy is the result of a spousal sexual assault reported to a law enforcement agency, or she fears physical injury. The woman must provide her doctor

with a signed statement under penalty of perjury that she has so notified her husband or that she qualifies for one of the exceptions. 18 Pa. Cons. Stat. § 3209.

Section 3209 effects few women. Only 20% of women who obtain abortions are unmarried, 93a; of those, 95% notify their husband. J.A. 243 (testimony of Sue Roselle). The most common reasons for nondisclosure are the husband's illness, the failure of the marriage, or the husband's opposition to abortion. J.A. 244-245 (testimony of Sue Roselle).

Although women who fear physical abuse are exempted from notifying their husbands, petitioners focused on the adequacy of this exception. Petitioners' expert testified that some women who are in a "battering relationship" can suffer from a form of mental disorder called Post-Traumatic Stress Disorder. As a

result, some of these women have a psychological inability to avail themselves of Section 3209's exception for fear of physical abuse. 200a-201a; J.A. 219-227, 231-32 (testimony of Lenore Walker).

There was no testimony, however, on how many of the small group of married women seeking abortions without disclosing it to their husbands are battered. 95a; J.A. 235, 239-240 (testimony of Lenore Walker), 392 (testimony of Jean Dillon).[11] Nor was there any testimony on how many of these battered women--who are able to conceal their pregnancies, arrange and have an abortion, and pay for it without

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[11]Dillon is a counselor at the Women's Resource Center of Monroe County and is a member of the Pennsylvania Coalition Against Domestic Violence. 124a-125a, J.A. 387-388.

their battering husband's knowledge[12]--would be psychol gically unable to check a line on a form. 93a-95a & n.6; J.A. 504-505 (spousal notice form). Nor was there evidence on how many women would be unable to invoke Section 3209's other exceptions to notification, or suffer ill effects with disclosure. 93a.

E. Confidential Medical Reports

For the purpose of collecting data for medical and public health knowledge, Section 3214(a) requires each abortion provider to file a confidential report for

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[12]Petitioner's expert testified that batterers constantly monitor their wives' activities, thoughts, and feelings--making it difficult for the woman to obtain an abortion. J.A. 212-213, 227, 237 (testimony of Lenore Walker). Yet, any woman must first obtain a pregnancy test to even schedule an appointment J.A. 95, 98 (stipulations), 263 (testimony of Sue Roselle). Scheduling delays up to two weeks typically occur. J.A. 90-95 (stipulations), 241 (testimony of Sue Roselle).

each abortion performed. 18 Pa. Cons. Stat. § 3214(a). 302a-304a. A variety of information is to be collected, including the basis for a physician's medical judgment concerning the necessity of third-trimester and medical emergency abortions, and the determination of gestational age. Id., § 3214(a)(8), (10), (11). A referring physician's identify, in addition to the performing physician's identify, also is to be collected. Id., § 3214(a)(1). The reports are not open for public inspection, with various safeguards ensuring that the reports are kept confidential.[13] Id., § 3214(b); 75a, 206a-208a, 269a, 277a.

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[13]Defendants' Exhibit 47C (J.A. 500-503) is the data collection form the Pennsylvania Department of Health will use to collect the date if petitioners' challenge is rejected. Defendants' Exhibit 47A (J.A. 493-96) is the data collection form presently used.

The reporting requirements concerning a physician's medical judgment gathers relevant data relating to maternal health, especially in the area of medically necessary abortions. 78a-79a. Recording the information also ensures compliance with the Act's provisions. 79a.

As to the referring physician's identify, a referring physician may make the required gestational age determination, § 3210(a), and provide informed consent, § 3205(a). 80a. In reviewing reporting forms, the Department of Health occasionally finds it necessary to contact the performing physician directly, 220a; it may be equally necessary to contact the referring physician for information. 80a.

These reporting requirements increase abortion costs only by "at most a few dollars per abortion." 78a; J.A. 91

(stipulation), 246 (testimony of Sue Roselle). Otherwise, there was no evidence to establish a drastic increase in delays or the reduced availability of abortions. [14] 78a-80a.

F. Publicly Available Reports

Sections 3207(b) and 3214(f) require every abortion facility to file two reports--one identifying its name, address, and corporate affiliations, and the other showing the total number of abortions performed the preceding year, broken down by trimester. 18 Pa. Cons. Stat. §§ 3207(b), 3214(f) (reporting forms). If a facility receives state-appropriated money for the preceding 12

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[14] In concluding that physicians might stop referring women for abortions if their names are identified in a confidential report, the District Court relied solely upon hearsay over respondents' repeated objections. 220a-221a; J.A. 30-31, 144, 153-54 (testimony of Sue Roselle, petitioner Allen).

months, these reports are available for public inspection and copying. [15] Id. Petitioners oppose public availability of these reports due to their fear that such would expose them to harassment and protests.

Presently, petitioners advertise in telephone directories, newspapers, radio broadcasts, and other media. J.A. 111 (stipulation); 441-43, 473, 484-485 (advertisements), 525 (testimony of Sue Roselle). Petitioners also encounter public protests on a regular basis--even though Sections 3207(b) and 3214(f) have never been in effect. 83a, 211a-213a; J.A. 259-260, 270 (testimony of Sue Roselle). The only evidence that the

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[15]For the facility registration report, which a facility files only once, the 12 months run from the date of the request to inspect and copy. For the quarterly statistical report, the 12 months run from the date of the report.

public availability of the facility and statistical reports would somehow increase these ongoing protests was petitioners' fear that it would happen. 82a-83a, 213a.

SUMMARY OF ARGUMENT

1. Roe v. Wade, properly understood and applied, permits states to regulate abortions as Pennsylvania has done in its Abortion Control Act. Contrary to what the petitioners say, the Court therefore need not, although it certainly may, use this case as a vehicle for re-examining Roe.

Roe does not establish an absolute or unlimited right to abortion on demand, but instead attempts to establish a limited right which also respects the important state interests which exist in protecting fetal life and maternal health, and in other areas. As Justice O'Connor has demonstrated, the Court early formulated the undue burden test to accommodate these important state interests, and that test remains the most appropriate standard for fulfilling Roe's promise that those interests will be respected.

The strict scrutiny of all abortion regulation which petitioners demand is not consistent with Roe. This standard's undisguised hostility to any state regulation of the abortion industry would eviscerate Roe's expressed concern for the important state interests at stake, and would instead convert Roe into a regime of abortion on demand.

2. None of the provisions of Pennsylvania's law imposes an undue burden on abortion, and all of them further one or more legitimate state interests. The Act contains an adequate exception for medical emergencies, which excuses compliance with many of the Act's requirements. Petitioners failed to show, in any concrete way, that this provision would operate to affect medical care adversely.

The Act's informed consent provisions

require the petitioners to provide their patients with accurate, objective and relevant information at a time and in a manner that encourages well-informed and well-considered decision-making. These provisions are in principle no different from the disclosures which other industries must make to their consumers; and they are consistent with other Pennsylvania law on informed consent, and even with many of the petitioners' own practices. Since the petitioners' scheduling practices require most women to make two trips to an abortion provider in any event, complying with the Act's informed consent provisions will impose little or no burden.

The Act's parental consent provision, with its judicial bypass, complies with this Court's decisions which repeatedly have upheld such requirements. The

petitioners' argument that Pennsylvania may require such consent, but may not require that it be "informed," cannot be taken seriously.

To support their facial challenge to the Act's spousal notice provision, the petitioners rely on a worst case scenario that may never happen; there is no evidence that this provision will have the broad practical effect of severely inhibiting access to abortions. The requirement does, however, serve the legitimate purpose of enabling a husband to protect his interests, which the Court has recognized, in the life of the fetus and in his marriage. The petitioners' equal protection claim ignores the Court's repeated admonition that abortion, which involves the purposeful destruction of the fetus, is different from all other medical procedures and may be treated differently.

Their claim that the right of privacy in marital communications shields an attempt by one spouse to conceal something from the other is nonsensical.

The Act's reporting requirements serve obvious and legitimate state purposes in protecting maternal health and ensuring compliance with the Act, and they impose no undue burden, either by disclosing confidential information or impeding access to abortion.

As to the disclosure of the identity of abortion facilities which receive tax dollars, the public certainly has a legitimate interest in knowing how its money is being spent. In any event, the petitioners, all of whom advertise their identity and location to the public, can hardly complain that they are harmed by the "disclosure" of information which is already known. All of the Act's

provisions are therefore constitutional under Roe.

3. Having said all this, it is nevertheless true that Roe v. Wade was incorrectly decided, and the Court may wish to take this occasion to review and overrule it. Roe's identification of the abortion right as fundamental finds no support in the Constitution, in history, in a societal consensus, or in the Court's own precedents, and its use of trimesters and viability to define the contours of that right is at bottom arbitrary. Because of these flaws, Roe stands as a source of instability in the law and as a barrier to public understanding of the proper function of the Court in our system of government. Roe should share the fate of Lochner v. New York, its equally ill-conceived forerunner in substantive due process.

ARGUMENT

I. THE COURT NEED NOT REVISIT ROE v. WADE IN THIS CASE, EXCEPT TO REAFFIRM WHAT IT HAS SAID ABOUT THE LIMITS OF THE RIGHT ROE RECOGNIZED.

A. Roe Established Only A Limited Right To Abortion, Subject To Reasonable State Regulation To Safeguard Important State Interests.

The linchpin of the petitioners' argument is their assertion that Roe v. Wade, 410 U.S. 113 (1973), demands "the most exacting scrutiny," Pet. Br. at 17, of all state laws regulating abortion; that Pennsylvania's statute, which they regard as "highly intrusive and burdensome," Pet. Br. at 2, cannot survive such exacting review; and that the Court therefore cannot uphold any part of this statute without overruling Roe. Pet. Br. at 17-19. Petitioners are mistaken. While there are certainly good reasons to

overrule Roe, and while the Court may well decide that this is an appropriate occasion for re-examining that decision, see 104-116 infra, there is no necessity for the Court to do so. Pennsylvania's statute comports with Roe in all respects; in upholding it, the Court need not address the issue of whether to overrule Roe. This is so, partly because the statute is neither burdensome nor intrusive, but mainly because the petitioners seriously misperceive the holding in Roe.

The petitioners evidently regard Roe as establishing a right to abortion which is absolute, or nearly so, and as holding that virtually all state regulation of abortion is presumptively invalid, sustainable, if at all, only after the most searching--and hostile--judicial

scrutiny.[16] Pet. Br. at 38. In doing so, the petitioners largely ignore what Roe actually says, and likewise ignore the way the Court has, for the most part, applied Roe.

Roe held that "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id. at 153. In Roe itself, however, the Court emphasized the limited

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[16]Not content with the traditional formulation of "strict scrutiny"--that, to survive it, laws "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests," Carey v. Population Services International, 431 U.S. 678, 686 (1977)--petitioners have invented a new "ultra-strict scrutiny," under which "only laws necessary and narrowly tailored to serve the most compelling state interests pass constitutional review." Pet. Br. at 17 (emphases added). There is, of course, no warrant for this novel standard in Roe or any other of the Court's abortion-related cases.

nature of the right it had just recognized:

> appellant...argue[s] that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree.... The privacy right involved...cannot be said to be absolute.... [There is no] unlimited right to do with one's body as one pleases....

Id. at 153-154. Roe's companion case, Doe v. Bolton, 410 U.S. 179 (1973), underscored this point: "a pregnant woman does not have an absolute constitutional right to abortion on her demand." Id. at 189. As Roe, 410 U.S. at 159, pointed out, "[t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and later, a fetus," and some measure of state regulation is therefore "reasonable and appropriate."

States have legitimate and important

interests in "safeguarding health, in maintaining medical standards, ... in protecting potential life[,]" id. at 154, and in other respects as well, see, e.g., H. L. v. Matheson, 450 U.S. 398, 411 (1981) (family integrity and protection of minors). In furthering these interests, States may treat abortion, because of its unique nature, differently than other medical procedures. Matheson, 450 U.S. at 412; Bellotti v. Baird, 428 U.S. 132, 148-149 (1976)(Bellotti I); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 67 (1976). A State need not "fine-tune its statutes so as to encourage or facilitate abortions[,]" Matheson, 450 U.S. at 413. To the contrary, States may adopt policies "'encouraging childbirth'" over abortion "'except in the most urgent circumstances.'" Ibid, quoting Harris v. McRae, 448 U.S. 297, 325 (1980); accord,

Maher v. Roe, 432 U.S. 464, 473-474 (1977).

Of all this, there is not the slightest hint in the petitioners' brief. Petitioners' one-sided reading of Roe would jettison its carefully limited holding in favor of abortion on demand, and would engraft onto the Constitution their own implacable hostility to any state regulation of their industry.[17] Roe recognized not just a right, but necessary and appropriate limits on that right, and this case requires the Court to take seriously, as the petitioners do not, what Roe said about those limits.

Regrettably, the Court has not always

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[17]Petitioners, it bears remembering, are not "women facing unwanted pregnancies," Pet. Br. at 38, but a group of organizations and individuals who are in the business of providing abortions. J.A. 86-87, 89, 91-92, 94, 96-97 (stipulation).

done so in the past. While this case does not require the Court to repudiate Roe, it does require that the Court again repudiate the approach to review of abortion laws of such cases as Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), and Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), in which the Court seemed eager to seize upon any excuse to strike down any state regulation of abortion. See, e.g., Thornburgh, 476 U.S. at 812 (White, J., dissenting)(Court strains to avoid a permissible reading of the statute). Petitioners see this overt hostility to state interests as the essence of Roe, but we believe that the dissenting Justices in those cases were correct in asserting that it was the Court's approach, and not the state regulations under attack, which was

inconsistent with Roe. See Thornburgh, 476 U.S. at 783 (Burger, C.J., dissenting)("The Court has departed from the limitations expressed in Roe"); id. at 808 (White, J., dissenting)("The Court's ruling...is not even consistent with...Roe")(emphasis in original); id. at 829 (O'Connor, J., dissenting)(Court's new test a "dangerous extravagance"); Akron, 462 U.S. at 462-463 (O'Connor,J., dissenting)(Court's analysis inconsistent with previous abortion cases); see also Colautti v. Franklin, 439 U.S. 379, 401 (1979)(White, J., dissenting)(Court withdrawing from the States some of the power reserved to them in Roe). The Court has, we think, already repudiated this approach in Webster v. Reproductive Health Services, 492 U.S. 490, 521 (1989)(opinion of Rehnquist, C.J.)("no doubt that our holding today will allow some governmental

regulation of abortion that would have been prohibited under the language of such cases as Colautti...and Akron...."), Hodgson v. Minnesota, 110 S.Ct. 2926 (1990), and Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990).

In this case, the Court should again reaffirm Roe's holding that the right to abortion is not absolute or unlimited, but must accommodate legitimate and important state interests. In our view, that accommodation is best served, short of overruling Roe, by employing the "undue burden" standard for reviewing state regulation of abortion.

B. Under Roe And Its Progeny, State Regulation Of Abortion Is Properly Evaluated Under The "Undue Burden" Standard.

In her dissenting opinion in Akron, 462 U.S. at 452, Justice O'Connor,

writing for herself and two other Justices, stated her understanding of the correct standard for evaluating state abortion regulations under Roe and its progeny.

> [N]ot every regulation that the State imposes must be measured against the State's compelling interests and examined with strict scrutiny. This Court has acknowledged that "the right in Roe v. Wade can be understood only by considering both the woman's interest and the nature of the State's interference with it. Roe did not declare an unqualified 'constitutional right to an abortion'... Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." ... If the impact of the regulation does not rise to the level appropriate for our strict scrutiny, then our inquiry is limited to whether the state law bears "some rational relationship to legitimate state purposes."
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> . . . .
>
> The "undue burden" required in the abortion cases represents the threshold inquiry that must

> be conducted before this Court can require a State to justify its actions under the exacting "compelling state interest" standard.

Id. at 461-463; Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting); Hodgson, 110 S.Ct. at 2949-2950 (O'Connor, J., concurring in part and concurring in the judgment in part).

This formulation has come to be known as the "undue burden" standard. Petitioners dismiss it as a "novel concept," Pet. Br. at 35, "which has never commanded a majority or even a plurality of this Court," id. at 34, but in this they are quite wrong. As Justice O'Connor has demonstrated, "[t]hese principles for evaluating state regulation of abortion were not newly minted" in her Akron dissent. Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting). The "undue burden" standard first appeared shortly

after Roe, in Bellotti I, 428 U.S. at 147, and Danforth,[18] and was then "articulated and applied with fair consistency...in cases such as Harris v. McRae, 448 U.S. 297, 314 (1980), Maher v. Roe, 432 U.S. 464, 473 (1977), [and] Beal v. Doe, 432 U.S. 438, 446 (1977)...." Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting). See Akron, 462 U.S. at 461-462, n. 8 (O'Connor, J., dissenting)(collecting cases). Even in Akron, the majority followed this undue burden approach in some respects, id. 476 U.S. at 829 (O'Connor, J., dissenting). It was not until Thornburgh that the Court made a

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[18]The Court in Danforth did not explicitly use the undue burden standard, but in Bellotti I, decided the same day, the Court explained that "we held [in Danforth] that a requirement of written consent...is not unconstitutional unless it unduly burdens the right to seek an abortion." Bellotti I, 428 U.S. at 147.

"clean break with precedent," id. at 829 (O'Connor, J., dissenting), discarding any variant of the undue burden standard in favor of the "dangerous extravagance," ibid, of striking down any abortion regulation which "pose[d] an unacceptable danger of deterring the exercise of [the] right." Id. at 767-768.

"An undue burden will generally be found in situations involving absolute obstacles or severe limitations on the abortion decision...." Id. at 828 (O'Connor, J., dissenting) (citations and quotations omitted). Thus, in Roe itself, the Court struck down a Texas law that prohibited all abortions except those necessary to save the life of the mother. In Danforth, the Court invalidated parental consent and spousal consent provisions which allowed third parties to interpose an absolute, and possibly

arbitrary, veto on the right to seek an abortion; and likewise invalidated a ban on saline amniocentesis because it had the practical effect of prohibiting most abortions after 12 weeks.

On the other hand, an undue burden does not exist just because a state regulation "may inhibit abortions to some degree." Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting). Thus, in Planned Parenthood Ass'n. v. Ashcroft, 462 U.S. 476 (1983), five members of the Court joined in upholding a Missouri statute that required a pathology report for all abortions, even though it added about $20 to the cost of each abortion. Id. at 490 (opinion of Powell, J.)(extra cost does not "significantly burden" the abortion decision); id. at 505 (O'Connor, J., concurring in part and dissenting in part)("no undue burden"). Similarly, in

Matheson the Court held, "[t]hat the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute." Id. 450 U.S. at 413. See Akron, 462 U.S. at 466-467, 472-473 (O'Connor, J., dissenting)(no undue burden imposed by hospitalization for second-trimester abortions and 24-hour waiting period).

The respondents are of course aware of the substantial criticism leveled against the undue burden standard -- that it is a standard essentially without content, licensing judges with unchanneled discretion to follow their own subjective leanings.[19] See Webster, 492 U.S. at 536

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[19]The petitioners' other attacks on the undue burden standard, see Pet. Br. at 34-38, require little comment. Their complaint that it is "novel" and therefore unknown, id. at 34-35, we have already shown to be unfounded. Their complaint that it is "inadequate" because it would allow forms of regulation that they

n. * (Scalia, J., concurring in part and concurring in the judgment). This criticism is to some degree unfair. The undue burden standard is, after all, not the only test the Court uses that lacks mathematical precision: if the concept of an "undue burden" is not self-defining, neither is that of a "compelling state interest." And, to take an example from another area, when, exactly, does state regulation go "too far" and become a

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oppose, id. at 35, is pure question-begging. Their final complaint, that the undue burden standard somehow pits "suffering" women against the state in an unequal contest of litigation resources, id. at 38, is odd in a brief with the names of fourteen lawyers on its cover; the petitioners at any rate do not lack litigation resources. Nor is this an accident: as a glance at the captions on the Court's abortion cases will confirm, ever since the Court's holding in Bolton, 410 U.S. at 188-189, that abortion providers have standing to assert the rights of pregnant women, the brunt of the litigation against abortion regulation has been borne by the abortion providers who have an economic stake in it.

taking of property for which compensation is required? Cf. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), with Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987).

Moreover, as Justice O'Connor has pointed out, "[t]he 'unduly burdensome' standard is particularly appropriate in the abortion context because of the nature and scope of the right that is involved. The privacy right in the abortion context 'cannot be said to be absolute.' Roe, 410 U.S. at 154." Akron, 462 U.S. at 463-464 (O'Connor, J., dissenting)(emphases in original). Roe is an attempt to establish a limited fundamental right, while at the same time recognizing and accommodating the important interests of the state; and unless the Court is prepared to overrule

Roe, [20] the Court should employ a judicial standard which reflects this attempt.

Neither of the obvious alternatives to undue burden analysis accommodates both of the interests which Roe recognized as important. The adoption of rational basis analysis for all abortion regulation is, we believe, simply a way of overruling Roe's attempt to carve out a special constitutional status for the abortion decision. Webster, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in judgment); id. at 556 (Blackmun, J., dissenting); Thornburgh, 476 U.S. at 789-90, 796 (White, J., dissenting); Roe, 410 U.S. at 172-173 (Rehnquist, J., dissenting). Similarly, to degree strict scrutiny for all such

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[20]As an alternative argument, we ask the Court to do just that. See 104-116 infra.

regulation does equal violence to Roe, albeit in a very different way, by reducing to "shallow rhetoric" its expressed concern for the important state interests at stake. Thornburgh, 476 U.S. at 784 (Burger, C.J., dissenting). To the extent, then, that the criticism of undue burden analysis as indeterminate and standardless is valid, the fault lies not so much with the undue burden test as with Roe itself. If the undue burden test is unworkable, it is because Roe itself is unworkable.

The respondents are also aware that, however impeccable its lineage, the undue burden standard apparently does not now command a majority on the Court, and may indeed retain the support of only a single Justice. Nevertheless, in the next part of this brief, we analyze the provisions of Pennsylvania's law under this standard.

We do this, first, because we believe Justice O'Connor is correct that this is the appropriate standard under Roe and its progeny. Second, whether Justice O'Connor's analysis is historically accurate or not, her opinions in Webster and Hodgson embody, as the Court of Appeals pointed out, 18a-30a, the currently governing standard under the principles of Marks v. United States, 430 U.S. 188 (1977). Finally, abortion regulations that pass muster under the undue burden standard will perforce satisfy any less demanding test. We turn, then, to the specific provisions of Pennsylvania's statute.[21]

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[21]The petitioners suggest that, if their challenge to the statute under Roe is rejected, the Court should remand the case for "consideration of other constitutional principles that support the right to choose abortion." Pet. Br. at 19, n. 27. In some specific instances, the petitioners have made and preserved

II. PENNSYLVANIA'S STATUTE IS IN ALL RESPECTS CONSTITUTIONAL UNDER THE UNDUE BURDEN STANDARD.

The petitioners attack the Abortion Control Act's provisions dealing with medical emergencies (§ 3203), informed consent (§ 3205), parental consent for minors (§ 3206), spousal notice (§ 3209), and reporting and disclosure of information (§§ 3207, 3214). We discuss these in turn.[22]

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alternative challenges to provisions of the statute; these are discussed in their brief and in ours. In all other respects, while the petitioners did raise alternative grounds for relief in their complaint, J.A. 67 (complaint), they did not rely on these theories when the case was submitted to the District Court for decision, or in the Court of Appeals. See Plaintiff's Proposed Findings of Fact and Conclusions of Law, p. 57-72 (filed June, 1990). They must therefore be considered to have abandoned these claims. E.g., EEOC v. Westinghouse Electric Corp., 925 F.2d 619, 631 (3d Cir. 1991).

[22]As the Court of Appeals said, 74a, n. 27, the Act contains a broad severability provision that "the invalidity [of any word, phrase or

A. Definition Of Medical Emergency.

Section 3203 of the Act defines a "medical emergency" as

> [t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

The existence of a medical emergency, as so defined, excuses compliance with the Act's requirements as to informed consent (§ 3205), parental consent for minors

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provision] shall not affect any other word, phrase or provision or application of this Act which can be given effect without the invalid word, phrase, provision or application." Supra at 3. Except for the medical emergency provision, which does implicate several other provisions, see 35a, we believe that all the challenged sections are severable from the Act and from each other; petitioners have not argued otherwise.

(§ 3206), spousal notice (§ 3209), the determination of gestational age (§ 3210) and procedure in post-viability abortions (§ 3211).

The petitioners attacked the exception for medical emergencies as too narrow and as void for vagueness, and the District Court agreed, 235a-238a, but the Court of Appeals did not.[23] 35a-43a. In this Court, the petitioners claim that the Court of Appeals improperly re-wrote the medical emergency provision, broadening it to save it from unconstitutionality, and that even as thus construed it is still too narrow. Pet. Br. at 60-61. They do not, however, mention their earlier claim that the provision is void for vagueness,

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[23]Technically, the District Court did not reach the petitioners' void-for-vagueness claim, but he did remark that he found it "persuasive." 237a-238a, n. 32.

and this issue is therefore not before the Court.

Pressed in the courts below to identify concrete medical situations whose urgency would preclude complying with the Act's requirements, but which nevertheless would not constitute medical emergencies within the meaning of Section 3203, petitioners identified three: inevitable abortion, premature ruptured membrane, and preeclampsia. 36a, 237a. The petitioners' own witnesses, as well as the witness for the respondents, agreed that the proper treatment for each of these conditions is to terminate the pregnancy quickly, and that to delay this treatment exposes the patient to the destruction of vital organs, hemorrhaging, shock, infection and death. Supra at 11-12. There is, we submit, no conceivable reading of Section 3203's definition of

medical emergency that does not encompass these life-threatening situations.

The Court of Appeals was thus not engaged in a strained "rewrit[ing of] a state law to conform it to constitutional requirements," Pet. Br. at 61 (quotation marks and citation omitted), but in a straightforward application of the law to an undisputed set of facts. The petitioners were unable to identify any real-life situation in which the operation of the medical emergency provision would adversely affect patient care, and their challenge to that provision is thus without merit.[24]

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[24]Despite what they said in the courts below, the petitioners now hint that there may be "other complications of pregnancy" whose proper treatment may be obstructed by the medical emergency provision. Pet. Br. at 61, n. 96. They rely on the amicus brief submitted by ACOG, which in turn contains a laundry list of "conditions that may be exacerbated by pregnancy."

B. Informed Consent.

In their determination to rid themselves of the Act's provisions on informed consent, the petitioners have placed themselves in the odd position of arguing that many of their own practices, now that they are mandated by the Act, "jeopardize women's health," "interfere[] with the provision of quality medical care," and "serve no legitimate... interest." Pet. Br. at 48, 50. Their attack on these provisions is thus best

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Br. of American College of Obstetricians and Gynecologists, et al., at 3 n. 17 and 27. Neither brief explains under what circumstances these conditions may require termination of the pregnancy, what the consequences are to the patient if the abortion is neglected or delayed, or why these situations do not fit within § 3203's definition of a medical emergency. Nor is this the time for such explanations. If these matters were worth exploring, they should have been explored at trial, not in footnotes before this Court. See supra at 10, n.7 (testimony of ACOG-certified specialist).

viewed not as the product of a principled disagreement with them, but simply as the knee-jerk reaction of an industry unaccustomed to regulation, to any governmental action that threatens its own prerogatives.

1. Information Given by Physicians.

Section 3205(a)(1) of the Act requires that the operating physician, or the referring physician, inform the woman of "the nature of the proposed procedure...and of those risks and alternatives to the procedure...that a reasonable patient would consider material to the decision whether or not to undergo the abortion";[25] the probable gestational

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[25]This provision is identical to the general definition of "informed consent" in Pennsylvania law, see Pa. Stat. Ann., tit. 40, § 1301.103 (Purdon 1991 Supp.), and is identical to the recitation on the consent forms used by two of the petitioners. See J.A. 464, 469 (consent forms).

age of the fetus;[26] and the medical risks of carrying the child to term.

Petitioners make no real effort to show that these provisions impose an undue burden. They do argue that the requirement that physicians personally deliver this information will increase the cost of abortions, but neither they nor the District Court made any effort to quantify this effect, cf. Ashcroft, 462 U.S. at 489-90 ($20 increase not a significant burden), or to show that it will limit the availability of abortions significantly, or at all.

Rather, petitioners argue that these provisions do not further any legitimate state interest. As the Court of Appeals said, however, "this type of information

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[26]All of the petitioners determine probable gestational age before performing an abortion. J.A. 105 (stipulation).

'clearly is related to maternal health and to the State's legitimate purpose in requiring informed consent.'" 47a, quoting Akron, 462 U.S. at 446. Petitioners do not contend that any of this information is inaccurate, unverifiable or inflammatory. Indeed, the worst that petitioners can find to say about any of the required information is that one item--the risks of carrying to term--may be irrelevant to those women who are forced to seek an abortion for medical reasons.[27] But a law is not irrational merely because it is overinclusive or underinclusive; laws need not be perfect to be rational. Vance v. Bradley, 440 U.S. 93, 108 (1979).

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[27]In 1986, the five petitioner clinics accounted for about 40% of all the abortions in Pennsylvania. 149a; J.A. 488 (quarterly reports). Of these, only about 0.7% were performed for medical reasons. Ibid.

More broadly, the petitioners appear to be arguing for a per se rule that an informed consent law can never require the provision of any specific piece of information, on the ground that "'the supply of specific information to all patients regardless of their specific circumstances...is contrary to the standard medical practice that informed consent be specifically tailored to the needs of the specific patient.'" Pet. Br. at 51, quoting 177a (District Court opinion). There is no warrant for such a rule: even in Akron, the Court said that an informed consent law that required the disclosure of specific information, including gestational age, was "certainly...not objectionable." 462 U.S. at 445-446, n. 37. Nor do the facts of this case support such a rule. Despite what the District Court said, it is not

"standard medical practice" to tailor information to each patient; at least, it is not the petitioners' standard practice. The petitioners themselves uniformly use standardized forms and rote recitations to inform their patients; one of them even takes patients in batches of four. Supra at 13.

Nor is it the standard practice in Pennsylvania for other areas of medical practice. Quite apart from the Abortion Control Act, Pennsylvania law on informed consent requires that all patients be given the information that a "reasonable patient" would consider material, Pa. Stat. Ann., tit. 40, § 1301.103 (Purdon 1991 Supp.); see supra at 60, an approach which allows the patient to decide what information is relevant to his or her specific circumstances. The approach the petitioners advocate, not surprisingly,

would allow the petitioners to decide this question for their patients, on the paternalistic ground that patients must be protected from "anxiety."[28] Pet. Br. at 52. This approach, simultaneously patronizing and self-serving, see Canterbury v. Spence, 464 F.2d 772 (D.C.Cir.), cert. denied, 409 U.S. 1064 (1972), is certainly not the norm in Pennsylvania.

Finally, the petitioners argue that it is irrational to require physicians personally to deliver this information. Pet. Br. at 53. As the Court of Appeals said, however, it is "patent that a state

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[28]The Abortion Control Act, like Pennsylvania informed consent law generally, does allow a physician to omit information if he reasonably believes that providing it will have a "severely adverse effect" on the patient's health. 18 Pa.Cons. Stat. § 3205(c). Cf. Pa. Stat. Ann., tit. 40, § 1301.103 (Purdon 1991 Supp.).

may rationally decide that physicians are better qualified than counselors to impart this information and answer questions about the medical aspects of the available alternatives."[29] 47a-48a; see J.A. 266-267 (testimony of Sue Roselle)(counselors not qualified to answer questions on fetal development). The District Court's statements to the contrary, 242a, simply represent his own disagreement with the considered judgment of the legislature, and do not show that that judgment is irrational. Under rational basis analysis,

> those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true.... The District Court's responsibility

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[29]Counselors are often poorly paid, part-time employees who may have little formal education. Supra at 14.

> for making findings of fact does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that [there are no] convincing statistics in the record to support it.

Vance, 440 U.S. at 111 (citations and quotation marks omitted).

2. Information Given by Others.

Section 3205(a)(2) requires that the pregnant woman also be informed that the Pennsylvania Department of Health publishes materials which "describe the unborn child and list agencies which offer alternatives to abortion," and that a free copy will be provided on request; that medical assistance benefits may be available for prenatal, childbirth and neonatal care, with more specific information available in the Department's printed materials; and (except in rape cases) that the father of the unborn child

is liable for child support, even if he has offered to pay for the abortion. Unlike the medical information required by Section 3502(a)(1), this information need not be conveyed by a physician.

Much of what we said in the preceding section applies here as well. Once again, petitioners rely mainly on the idea that some of this information will be irrelevant to some patients; once again, they offer nothing beyond their own conclusory statements to show that the information required is either inaccurate or inflammatory; and once again, Section 3205 will occasion little or no change in their existing practices. As the Court of Appeals noted, 49a, most of the petitioners already offer some form of "options counseling" that explores the alternatives to abortion and the resources that might be available to support the

woman's decision not to abort. Among them, the petitioners already offer every item required by Section 3205(a)(2), including pictures describing fetal development. Supra at 15-16, J.A. 153 (testimony of petitioner Allen). Since the petitioners presumably are not in the business of obstructing access to abortions, it seems safe to conclude that these practices do not impose an undue burden, and that they are rationally related to ensuring that the woman's choice is fully informed and not the product of coercion. 49a-50a. If, as the result of receiving this information, a woman decides not to abort her pregnancy, so much the better, for the Commonwealth also has a legitimate interest in preserving the life of the unborn child, and may adopt policies "encouraging childbirth except in the most urgent

circumstances." Matheson, 450 U.S. at 413, quoting Harris, 448 U.S. at 325.

3. First Amendment Issues.

The petitioners also argue that the Act's informed consent provisions violate their First Amendment rights, and those of their patients, by forcing them to be unwilling conveyers and recipients of "the state's message, at the cost of violating their own conscientious beliefs and professional commitments." Pet. Br. at 54.[30] The Court of Appeals held, however, that the petitioners were engaged in commercial speech; that the disclosure

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[30]As the Court of Appeals said, the information required by Section 3205 is objective, accurate and relevant. 49a. It would be interesting to know what forbidden "message" the petitioners think is conveyed by telling women about the risks, alternatives and resources that bear on their decision, and equally interesting to know just what "conscientious beliefs and professional commitments" require that this information be withheld.

requirements of Section 3205 are similar to those imposed upon a long list of other industries and professions; and that they are entirely appropriate under the Court's decision in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). 50a-52a.

We believe that the Court of Appeals' analysis is unanswerable, and note that the petitioners have not attempted to answer it. They do not dispute the Court of Appeals' holding that they are engaged in commercial speech, or even mention it; nor do they mention, much less try to distinguish, the holding in Zauderer.

4. Waiting Period.

Section 3205 requires that the information needed for an informed consent be provided to the woman at least 24 hours before the abortion is performed. This Court, as the Court of Appeals noted, 53a,

n. 20, has held repeatedly that procedures which effectively delayed abortions for far longer periods do not unconstitutionally burden the abortion decision. Ohio, 110 S.Ct. at 2980-2981 (judicial bypass of parents that could consume 14 days), citing Ashcroft, 462 U.S. at 477, n. 4, 491, n. 16 (same, 17 days). The record in this case supports the same outcome.

Petitioners and the District Court rely on the arguments that the 24-hour waiting period necessitates two trips to the abortion provider, which increases costs, especially for women who must travel; and that, because abortion clinics do not perform abortions every day, the waiting period in practice will produce delays much longer than 24 hours, which in turn increases the risk of the abortion procedure. Pet. Br. at 49; 239a-240a.

They ignore the facts that most women already make two trips--once for a pregnancy test and once for the abortion itself--and that there is typically a time lag between the two. Supra at 17; J.A. 87, 90-91, 95, 98 (stipulation). None of the petitioners will even schedule an abortion without a positive pregnancy test, and the abortion is then typically scheduled within one to two weeks thereafter. Ibid. No reason appears in the record why women could not be given the information Section 3205 requires at their first visit, thus obviating any additional delay.[31] Petitioners might have to adjust their procedures somewhat, but they can hardly claim that the

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[31]Of course, not all women get their pregnancy test from an abortion provider, but Section 3205 allows a referring physician, as well as an operating physician, to provide the necessary information for informed consent.

Constitution protects their accustomed office routine; "[t]he Constitution does not compel [Pennsylvania] to fine-tune its statutes" for the petitioners' convenience. Matheson, 450 U.S. at 413.

As to the idea that a delay in performing an abortion increases the risk to the patient, this is true only in the most general sense, and provides no real support for the petitioners. The record is clear that there is no measurable increase in risk from a delay as short as a day, or even a week. Supra at 16-17. Increases in risk show up only over periods of two to three weeks, and even then the increase is from one very small number to another very small number.[32] Ibid; see 153a. Petitioners themselves

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[32]For example, from .8 to 1.1 deaths per hundred thousand abortions. Supra at 16.

entered into a binding admission in this case, see Fed. R. Civ. Proc. 36, that "[a] week delay in the first trimester will not likely result in a harm...," J.A. 552, and their own practices, which allow, encourage or even require delay for a variety of reasons, confirm this. Supra at 17-18. The Court of Appeals thus correctly concluded that the waiting period imposes no undue burden on the abortion decision.

Likewise, the Court of Appeals was correct that the waiting period rationally furthers the Commonwealth's interest "in ensuring that such a decision is both informed and well-considered [, which is] rationally related to the states' legitimate interest in the life and health of the mother as well as its interest in the potential life of the fetus." 54a

(emphases in original).[33] As Justice O'Connor said in Akron,

> the decision to abort is a stressful one, and the waiting period reasonably relates to the State's interest in ensuring that a woman does not make this serious decision in undue haste.... The waiting period is surely a small cost to impose to ensure that the woman's decision is well considered in light of its certain and irreparable consequences on fetal life, and the possible effects on her own.

Id., 462 U.S. at 474 (O'Connor, J., dissenting) (quotation marks omitted).

C. Parental Consent.

Section 3206(a) requires the informed consent of one parent or guardian for an

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[33]Such waiting periods are not unique to abortion. See 42 C.F.R. § 441.253 (30-day waiting period for Medicaid-funded sterilizations); Pa. Stat. Ann., tit. 73, § 201-7(a)(Purdon 1991 Supp.)(3 business days for consumer to rescind certain sales contracts). The state's interest in informed and well-considered decisions is surely as weighty in the area of abortion as in the area of consumer sales contracts.

abortion on any unemancipated woman under the age of 18.[34] This section also establishes a judicial bypass to this requirement, both expeditious and anonymous, in which a minor may establish that she is mature and capable of giving informed consent to the abortion, or that an abortion is nevertheless in her best interests. § 3206(c)-(h). The Court has consistently approved parental consent laws, provided that the judicial bypass is adequate. See Hodgson, 110 S.Ct. at 2942 (opinion of Stevens, J.)(Court has never challenged state's judgment that the abortion decision be made only after consultation with parent); Akron, 462 U.S. at 439-440; Bellotti II, 443 U.S. at 639-

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[34]Where neither a parent nor guardian is available "within a reasonable time...and manner," the consent of any adult standing in loco parentis is sufficient. § 3206(b).

651 (opinion of Powell, J.)

The petitioners do not quarrel with the desirability of parental involvement when a minor faces so grave a decision; all of the petitioners encourage such involvement and encourage parents to accompany their daughter. Supra at 18. Between 50% and 60% of the minors whom the petitioners now see are accompanied by at least one parent, and one petitioner requires that all minors be accompanied by an adult, if not by a parent. Supra at 18-19.[35]

The petitioners concede that Pennsylvania may require parental consent for minors as long as there is an adequate judicial bypass, Pet. Br. at 55, and they do not attack the adequacy of Pennsylvania's judicial bypass. Their

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[35]In 1988, about 12% of Pennsylvania abortions were on minors. 150a.

only argument is that, while a state may require parental consent, it may not require informed parental consent, id. at 56, that is, a state may not require that parents be informed about the risks, alternatives and resources that may bear on their own and their daughter's decision.

To call this argument outlandish seems inadequate. The point of requiring parental consent is not to collect a meaningless signature, but to provide the pregnant minor with the benefit of an adult's advice and judgment about the "nature and consequences" of the decision she faces, Danforth, 428 U.S. at 67, an objective which is obviously not achievable if the adult is herself not cognizant of these matters. A requirement of informed consent is permissible here for the same reasons it is permissible in

all other cases, and for another as well: as the court recognized in both Matheson, 450 U.S. at 411, and Ohio, 110 S.Ct. at 2983, parents are important sources of medical information on their children, and the informed consent process facilitates this exchange of information. Finally, to the extent that petitioners rely on logistical and other obstacles that may make it burdensome for even a supportive parent to comply with Section 3206, Pet. Br. at 57, the existence of the judicial bypass option obviates any such difficulties.

D. Spousal Notice.

Spousal notice is governed by Section 3209 of the Act. Enacted "to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting

the prenatal life of that child," ibid, Section 3209 requires that a married woman who is about to undergo an abortion notify her husband and provide her doctor with a signed statement that she has done so. Id., § 3209(a).

The spousal notice requirement does not apply in the case of a medical emergency, id., § 3209(c). Nor does it apply where the woman provides a statement that she has not notified her husband because he is not the father of the child or could not, after diligent effort, be located; or because the pregnancy resulted from a reported incident of spousal sexual assault; or because she has reasons to believe that notifying her spouse will likely subject her to bodily injury. Id., § 3209(b).

1. Right to Abortion.

The Court of Appeals recognized that

in most respects these provisions do not even arguably impose an undue burden on the decision to seek an abortion: they impose no "drastic or severe time delay, increase in costs, or decrease in the number of abortion providers. Nor [do they] give a state-sanctioned veto power over the woman's abortion decision to another person." 63a. The two judges of the majority, however, held that an undue burden inheres in the possible consequences of spousal notification. Relying on Hodgson, and on the plurality opinion in Bellotti v. Baird, 443 U.S. 622 (1979)(Bellotti II), they held that spousal notification exposes the woman to the possibility of physical, economic or emotional pressure from her husband to forego an abortion, or to punish her if she does not, 63a-68a, and that this possibility constitutes a "severe

limitation on the woman's abortion decision." 63a. We submit that the Court of Appeals was mistaken, for substantially the reasons advanced by Judge Alito in his dissenting opinion. 87a-96a.

The majority judges, we believe, misapplied the undue burden standard in this instance. To establish that a law imposes an undue burden, it is surely not enough--at least in a facial challenge--to show that it may deter or inhibit some women from getting an abortion. As the Court has said in the related context of parental notice, "[t]hat [a statutory] requirement...may inhibit some minors from seeking abortions is not a valid basis to void the statute." Matheson, 450 U.S. at 413. Virtually any regulation could be said to deter someone from seeking an abortion, but the Court has not for that reason outlawed all regulation of

abortion. Any regulation that increases the cost of an abortion, for example, is likely to make an abortion marginally unaffordable for someone, and yet the Court has refused to strike down regulations on this ground. See Ashcroft, 462 U.S. at 489-90 (requirement for pathology report that added $20 to cost not unconstitutional); Akron, 462 U.S. at 466-467 (O'Connor, J., dissenting)(no undue burden in hospitalization requirement for second-trimester abortions even though costs more than doubled). Rather, those who would strike down an abortion regulation must show that it will have what Judge Alito called the "broad practical impact," 91a, of severely limiting access to abortions. See Danforth, 428 U.S. at 79 (law banning use of saline amniocentesis unconstitutional where it had the practical effect of

making abortions unavailable after twelve weeks). Thus properly understood, it is apparent that petitioners failed here to make their case.

First, unlike the record in Hodgson, the record in this case shows that the number of women who even theoretically could be affected adversely by spousal notice is very small. In Hodgson, which involved a requirement that both parents of a minor be notified before that minor had an abortion, the record showed that about half the children in Minnesota did not live with both parents, id., 110 S.Ct. at 2938, and that the most common reason for not notifying the second parent was fear of physical abuse. Id. at 2945, n. 36. In this case, the record shows that only about 20% of the women who obtain abortions are married; and of these, about 95% notify their husbands already. Supra

at 20. In other words, of all women who obtain abortions, only about 1% are married women who have not notified their husbands.

Of those women who did not notify their husbands and who offered a reason, none cited a fear of abuse. Ibid. Moreover, as Judge Alito correctly observed, of these few women, surely some, if Section 3209 were to go into effect, would notify their husbands without adverse consequences, while still others would avail themselves of the statutory exceptions to spousal notice. 93a. The number of women who might actually be deterred from seeking an abortion by the spousal notice provision is thus unknown, and possibly nonexistent, but certainly, at less than one per cent, very small.

Second, the statutory exceptions just referred to further distinguish this case

from Bellotti II and Hodgson. In Bellotti II, the statute provided no exception for minors who feared abuse from their parents,[36] while in Hodgson the statutory exception turned out to be, in practice, simply an alternative route to parental notification. Id., 110 S.Ct. at 2932, n. 7. Pennsylvania's statute, however, does have such an exemption in § 3209(b)(4), and others as well, and unlike the statute in Hodgson, the fear-of-physicial-injury exemption does not set in motion a series

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[36]Reliance on Bellotti II on this issue is problematic in any event, since no opinion in that case commanded a majority of the Court. Four justices did say that a requirement of parental notice would place an undue burden on minors because some parents might then obstruct the minor's access to an abortion. Id. 443 U.S. at 647 (opinion of Powell, J.). The other four justices who concurred in the judgment, however, noted specifically that the case involved only a requirement for parental consent, and did not decide the constitutionality of notice provisions. Id. at 655, n. 1 (Stevens, J., concurring in the judgment).

of events that results in the abusive husband being notified.

The petitioners and the majority in the Court of Appeals, however, rely heavily on the District Court's finding that "most battered women do not have the psychological ability to avail themselves" of this exception, 68a-69a, 201a, thus, they believe, making this exception as ineffective as the one in Hodgson. Even if this assertion is taken at face value, it does nothing to undermine the point made above, that the spousal notice provision could adversely affect, at most, fewer than 1% of the women who seek abortions. Even this is too generous, however, for there is rather less to the District Court's finding than meets the eye.

The witness upon whom the District Court relied testified about women who are

in a "battering relationship." According to this witness, women in such relationships are subjected not only to a recurring cycle of violence, J.A. 219-221, but also to the constant monitoring of their activities and even their thoughts, J.A. 212-213; "most batterers are so sensitive to what the women are behaving and thinking and feeling that he [sic] will pick up something [that] is different...." J.A. 227 (testimony of Lenore Walker). Women in such relationships can suffer from a form of mental disorder called Post-Traumatic Stress Disorder, one manifestation of which is "learned helplessness," the perception by the woman that no action of hers will enable her to escape the violence. 200a. It is women manifesting this "learned helplessness" whom the District Court found would not be able to

avail themselves of Section 3209's exception for physical abuse. 201a.

This finding, however, does not address the question of how many of these women would ever seek an abortion without their husband's knowledge in the first place. Battered women who perceive themselves as so helpless that they would never even try such a thing are indeed cruelly burdened, but by their batterers, not by the statute. In real life, the opportunity to invoke the fear-of-abuse exception will not be encountered by these battered women, but only by those battered women who have <u>already</u> mustered the psychological and physical resources necessary to verify their pregnancies, contact abortion providers, wait for their

appointments, [37] arrange for payment, and physically present themselves at the abortion sites--all without letting their husbands find out. Neither the District Court nor the witness --who had no actual experience with spousal notification provisions, J.A. 239-240 (testimony of Lenore Walker)-- said how many of these women would find themselves "psychologically incapable" of checking off a line on a form, which is all that Section 3209 requires. See J.A. 504-505 (spousal notice form).

The petitioners thus did not show that Section 3209 would have anything close to the "broad practical effect" of severely limiting access to abortions.

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[37]Typically, the woman must have a pregnancy test before her abortion will even be scheduled, and the abortion itself is typicaly schedule within two weeks thereafter. Supra at 17.

Their challenge is more accurately characterized as an attempt to rely on a "worst-case analysis" which may never happen, and which is simply inadequate to support their facial challenge to the statute. Ohio, 110 S.Ct. at 2981.

In the absence of any undue burden, the only remaining question is whether Section 3209 is reasonably related to any legitimate state interest. Despite what the petitioners say, Pet. Br. at 43-44, there is no real question that a husband has a "deep and proper concern" in his wife's pregnancy and in the fetus she carries, Danforth, 428 U.S. at 69; that the abortion decision may profoundly affect the marriage, in which he also has an interest, id. at 70; and that the State legitimately may act to enable him to

protect those interests.[38]

Nor can there be any real question that the law is reasonably designed to further those ends. The petitioners argue that wives either tell their husbands about their abortion decisions already, or have good reasons for not telling them. In the first case, they say, the law is unnecessary, in the second case it is harmful, and in either case it is an irrational means of furthering whatever legitimate interests the state may have. Pet. Br. at 43-44. This argument was well answered in Justice Stevens' concurring

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[38]The petitioners say that Section 3209, like the law in Danforth, gives a husband the power to "compel[] his wife to bear children for him." Pet. Br. at 44. They ignore the distinction, which the Court has always recognized, between laws requiring consent and laws requiring mere notice. See, e.g., Matheson, 450 U.S. at 411 n. 17; Hodgson, 110 S.Ct. at 2969. (Kennedy, J., concurring in judgment in part and dissenting in part).

opinion in Matheson. Speaking in the admittably different context of parental notice, and harking back to his earlier concurrence in Danforth, Justice Stevens rejected similar arguments against Utah's statute:

> It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will ... [act] arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children....
>
> Utah's interest in its parental-notice statute is not diminished by the fact that there can be no guarantee that meaningful parent-child consultation will actually occur.... The possibility that some parents will not react with compassion and understanding... does not undercut the legitimacy of the State's attempt to

> establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.

Matheson, 450 U.S. at 423-424 (Stevens,J., concurring in judgment)(footnote and citation omitted, bracketed matter in original), quoting Danforth, 428 U.S. at 103-104 (Stevens, J., concurring in part and dissenting in part).

The same is true here.[39] It may well

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[39]We do not suggest that the relationship between spouses equates with the parent-child relationship. Clearly, the interest served by parental notice--making available to the child the advice and support of her parents--is different from the interest served by spousal notice--preserving the possibility for a husband to participate in a decision that profoundly affects his own interest. This, however, does not undercut Justice Stevens' points that notice statutes are a rational way to pursue these interests, and that the possibility that such statutes might not always work out as intended does not destroy their legitimacy.

be true that a state cannot simply decree inter-familial communication that conforms to some idealized model of its own. But Section 3209 does nothing of the sort; rather, it seeks only to preserve the husband's interest in the possibility of such communication by making sure that the husband knows of his wife's intentions.

2. Other Issues.

The petitioners' remaining arguments require little discussion.[40] First, they claim that Section 3209 interferes with marital privacy. It is not entirely clear, however, what they mean by this, nor is it clear how a right to marital privacy--that is, the right to protect "the sanctity of their [marital] communications," Hodgson, 110 S.Ct. at

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[40]The Court of Appeals found it unnecessary to reach these arguments, 103a, n. 8, as did the District Court.

2944, n. 33 (opinion of Stevens, J.)(emphasis added)--can create a privacy interest in one spouse's unilateral decision to conceal important matters from the other. If the woman's own privacy interest is, as argued above, insufficient to justify this concealment, it is hard to see what is added by the invocation of the marital interest.

Lastly, the petitioners claim that Section 3209 violates the Equal Protection Clause. Pet. Br. at 47-48. Noting that Pennsylvania's law does not require that a husband notify his wife before undergoing a medical procedure that would affect his fertility, they claim that Section 3209 "embodies precisely the prohibited stereotype that wives should bear children." Id. at 48. The short answer to this is that the Court has repeatedly recognized the unique nature of the

abortion procedure and has repeatedly held that States are justified, because of its unique nature, in treating it differently from other medical procedures. Matheson, 450 U.S. at 412; Bellotti I, 428 U.S. at 148-149; Danforth, 428 U.S. at 67. Such state laws are based not upon a value judgment that all women should bear children, but upon the biological fact that only women bear children. Petitioners' reliance on the fact that spousal notice is not required in procedures that produce male sterility is thus misplaced. Pet. Br. at 46-47. The true analog to such procedures is not abortion, but female sterilization procedures. Pennsylvania requires neither wives nor husbands to notify their spouses of such procedures, and petitioners' equal protection claim is without merit.

E. CONFIDENTIAL REPORTS.

Section 3214 requires abortion facilities to file with the Department of Health an individual report for each abortion performed. These reports are kept confidential, as the law requires, and there is no evidence that any information from these reports identifying either a patient or a physician has ever been disclosed; in fact, neither this nor any other report even contains patients' names. Supra at 23; 205a-208a. The reports are used to gather a wide variety of information on maternal health, which is then released only in the form of statistical compilations. See, e.g., 149a-152a.

Among the information Section 3214 requires is the name of the referring physician, if any, § 3214(a)(1); and the bases for the following medical judgments:

that a third-trimester abortion was necessary to protect the life and health of the mother, § 3214(a)(8);[41] that a medical emergency existed, § 3214(a)(10); and the determination of gestational age, § 3214(a)(11). The petitioners claim that if these matters must be reported, physicians will be reluctant to refer or perform abortions, and that this in turn will reduce the availability of abortions. Pet Br. at 59. As the Court of Appeals said, however, these fears are at best unfounded, 79a-80a; and, we add, they are at worst self-fulfilling and self-serving. "Laws are not declared unconstitutional because of some general reluctance to follow a statutory scheme the legislature finds necessary to accomplish a legitimate

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[41]Second and third trimester abortions together accounted for only 6% of Pennsylvania abortions in 1988. 150a.

state objective." Hodgson, 110 S.Ct. at 2968 (Kennedy, J., concurring in judgment in part and dissenting in part).

These reporting requirements obviously further the Commonwealth's interest in collecting accurate information on maternal health, especially in the area of medically necessary abortions, and in ensuring compliance with the requirements of the Act.[42] 78-79a, 80a. They do not impose an undue burden on the abortion decision, and are

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[42]Under the Act, a referring physician may make the required determination of gestational age, § 3210(a), and may obtain the patient's informed consent, § 3205(a). In reviewing the reporting forms, the Department of Health sometimes finds it necessary to contact the reporting physician directly. 220a. While it may be true that the Department could rely on abortion clinics to obtain whatever information is needed from the referring physician, 272a-273a, it is not irrational for the legislature to prefer the Department to collect its data from the primary, and therefore most reliable, source.

therefore constitutional.

F. **PUBLICLY AVAILABLE REPORTS.**

Section 3209 requires each abortion facility to file a report with the Department of Health disclosing its name and address, and the names and addresses of any parent, subsidiary or affiliate organizations. Section 3214(f) requires each facility to file with the Department quarterly reports specifying the total number of abortions performed, broken down by trimester. Both of these reports are available for public inspection and copying only in the case of any facility which has received any state-appropriated money within the preceding 12 months. The petitioners claim that the public availability of these reports exposes them and their patients to abuse and harrassment from persons and groups who

are opposed to abortion.[43] Pet. Br. at 58. This claim, and the District Court's acceptance of it, 267a-268a, simply ignores two facts.

The first is that the identity and location of abortion providers is, and in the nature of things must be, easily accessible to the public. The petitioners could not function otherwise, and in fact all of them advertise in telephone directories, print or broadcast media. Supra at 26. The second fact, which follows unfortunately but naturally from the first, is that the petitioners are already the targets of substantial public protest, ibid., even though the public

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[43]They claim also that the public availability of these reports is an unconstitutional condition on their receipt of public funds, Pet. Br. at 58-59, n. 91. But as the Court of Appeals explained, 83a-85a, this adds nothing to the petitioners' case.

disclosure provisions of Sections 3209 and 3214 have never gone into effect. However disruptive and even illegal some of these protests may be, they are obviously not caused by these provisions of the Act. The petitioners, relying solely on their own self-serving speculations, claim that the public disclosure provision will result in an increase in such protests, 211a-213a, but the Court of Appeals correctly rejected their conclusory statements as insufficient to establish that these provisions will unduly burden the right to an abortion. 82a-83a.

On the other hand, the public disclosure provisions do further a legitimate state interest: that the public should know how its money is being spent. Such information is generally available to the public under Pennsylvania law, Pa. Stat. Ann., tit. 65, §§ 66.1 and 66.2

(Purdon 1959 & 1991 Supp.), and it hardly seems necessary to belabor either the legitimacy of the state's interest or the rationality of the means chosen to further it.

III. IN THE ALTERNATIVE, THE COURT SHOULD RE-EXAMINE AND OVERRULE ROE V. WADE, RETURNING THE REGULATION OF ABORTION TO THE STATES' DEMOCRATIC PROCESS.

In the preceding sections, we have argued at length that Roe v. Wade, properly understood and applied, does not forbid the abortion regulations contained in Pennsylvania's statute, and that this case therefore does not confront the Court with the necessity of reconsidering Roe. Nevertheless, it remains true that Roe is a deeply flawed decision, and it may be that the time has come to reconsider it.

The reasons for and against taking this step are familiar to the Court and need only be summarized here. On the one

hand, the Court is generally reluctant to formulate a rule of law broader than is necessary to decide the case that is actually before the Court. Webster, 492 U.S. at 525-526 (O'Connor, J., concurring in part and concurring in the judgment). On the other hand, the Court does overlook this rule fairly frequently, and it would be ironic if Roe, which itself decided a question so much more broadly than was necessary, should now be insulated from review by this rule. In addition, the no-broader-than-is-necessary rule, rigidly applied, would mean that many constitutional decisions could never be reconsidered until someone squarely defies them, a process that is unlikely to enhance either the development of the law or respect for the Court's decisions. Webster, 492 U.S. at 532-537 (Scalia, J., concurring in part and concurring in the

judgment).

If the Court does decide to reach the question of Roe's continuing validity--or, alternatively, if the Court must reach it because the Court holds that Pennsylvania's statute cannot be squared with Roe--the respondents have no doubt of the correct outcome. Justice White's formulation of the abortion right, in our view, is the correct one: "a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause. I cannot agree, however, that this liberty is so 'fundamental' that restrictions upon it call into play anything more than the most minimal judicial scrutiny." Thornburgh, 476 U.S. at 790 (White, J., dissenting); accord, Roe, 410 U.S. at 172-173 (Rehnquist, J., dissenting). The Court should overrule

anything in Roe to the contrary.

The arguments that support this position are, again, well known to the Court from the dissenting opinions in Thornburgh, in Akron, and in Roe itself. See also Br. of the United States as Amicus Curiae. Again, we do no more than summarize them here.

First and most importantly, Roe's holding that abortion is a fundamental constitutional right is untenable. The text of the Constitution obviously creates no such right; the text of the Constitution does not even mention abortion. Nor can such a right plausibly be located among the unenumerated, but still fundamental, rights protected by the Due Process Clause. The hallmark of such rights is that they are grounded in

> some source of constitutional value that reflects not the philisophical predilections of

> individual judges, but basic choices made by the people themselves in constituting their system of government... [Fundamental rights are located] either in the traditions and consensus of our society as a whole or in the logical implications of a system that recognizes both individual liberty and democratic order.

Thornburgh, 476 U.S. at 791 (White, J., dissenting). The holding in Roe has no such grounding--not in history and tradition, Roe, 410 U.S. at 174-177 (Rehnquist, J., dissenting), not in the necessary implications of a system of ordered liberty, Thornburgh, 476 U.S. at 793 (White, J., dissenting), and most certainly not in any consensus of society as a whole.

Nor can Roe be defended as the logical extension of the Court's "privacy" decisions. See Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Loving v. Virginia, 388

U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). The Court's decision in Roe underlined the difference between itself and these earlier privacy cases:

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus.... The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner, and Pierce and Meyer were concerned.

Id., 410 U.S. at 159. The decision in Roe was thus in no way preordained by the decisions in Eisenstadt, Griswold and the rest of the cases cited.[44] Roe's creation

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[44]By the same token, Roe's demise would in no way undermine those other decisions.

of a "fundamental" right which has no sound basis in the Constitution, in history, in a societal consensus, or even in the Court's own precedents, is simply an illegitimate exercise of "raw judicial power," Doe v. Bolton, 410 U.S. at 222 (White, J., dissenting), which the Court should disavow for this reason alone.

Second, the key points in Roe's analysis of the abortion right--viability and trimesters--are themselves arbitrary. As Justice White pointed out in his dissenting opinion in Thornburgh, the Court has never explained satisfactorily why the state's interest in protecting fetal life is "compelling" at the point of viability but not before. Id., 476 U.S. at 794-795. And as Justice O'Connor pointed out in her dissenting opinion in Akron, the trimester approach depends upon medical and technological factors which

are of no constitutional significance, and which in turn make the trimester approach so unreliable that the Court has already been forced to abandon it in part. Id., 462 U.S. at 454-456.

Third, Roe has had an "institutionally debilitating effect," Thornburgh, 476 U.S. at 814 (O'Connor, J., dissenting), on several levels. Roe stands as an anomaly among the Court's cases on fundamental constitutional rights, Akron, 462 U.S. at 452 (O'Connor, J., dissenting), working "a major distortion in the Court's constitutional jurisprudence." Thornburgh, 476 U.S. at 814 (O'Connor, J., dissenting). Far from being a source of stability in the law, Roe's arbitrariness has forced the Court to return to the issue of abortion time and time again, drawing ever finer lines to govern the states' attempts to regulate

in this area. Webster, 492 U.S. at 518 (opinion of Rehnquist, C.J.). This arbitrariness at times has infected other areas of the law as well, making it "painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." Thornburgh, 476 U.S. at 814 (O'Connor, J., dissenting). In addition, by reinforcing the idea that the Court's proper function is to impose its own notions of sound public policy, Roe "continuously distorts the public perception of the role of this Court," Webster, 492 U.S. at 535 (Scalia, J., concurring in part and concurring in the judgment), in a way that in the long run is bound to damage the Court as an institution.

That damage is not to the Court

alone, but also to the very "principles of self-governance" in a democracy. Id. at 536 n.*. Abortion is "a field where [the Court] has little proper business since the answers to most of the cruel questions posed are political and not juridical." Id. at 532. "Leaving the matter to the political process is not only legally correct, it is pragmatically so. That alone...can produce compromises satisfying a sufficient mass of the electorate that this deeply felt issue will cease distorting the remainder of our democratic process." Ohio, 110 S.Ct. at 2984 (Scalia, J., concurring). For all these reasons, the Court should overrule Roe.

The petitioners protest, however, that "[n]ever before has this Court bestowed, then taken back, a fundamental right that has been part of the settled rights and expectations of literally

millions of Americans...." Pet. Br. at 20. This, of course, is not true, and the parallel with the earlier case is instructive. Lochner v. New York, 198 U.S. 45 (1905), was, before Roe, the Court's last venture into substantive due process.[45] In Lochner as in Roe, the Court began with an undoubted liberty interest--in Lochner, the right of the individual to work as "may seem to him appropriate or necessary for the support of himself and his family," id., 198 U.S. at 56--which the Court then elevated into a fundamental right immune from state regulations which today seem innocuous indeed. In phrases that might have come from Thornburgh, the Court struck down New York regulations that allowed bakers to

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[45]The suggestion that Roe and Lochner have much in common is, of course, not a new one. See Roe, 410 U.S. at 174 (Rehnquist, J., dissenting).

work "only" ten hours per day and "only" sixty hours per week, as "mere meddlesome interferences with the rights of the individual," Lochner 198 U.S. at 61, enacted from "some other motive...than the purpose to subserve the public health or welfare." Id. at 63. Cf. Thornburgh, 476 U.S. at 759 (disparaging the motives presumed to underlie measures regulating abortion).

The Court has long since disavowed Lochner--in the petitioners' terms, it "took back" the right it had "bestowed"--see Ferguson v. Skrupa, 372 U.S. 726 (1963), and it should do the same with Roe. The petitioners' very phraseology betrays their, and Roe's, error. In this country, rights are not "bestowed" by this Court, but by the people, through the Constitution which they have ordained. When the Court finds itself usurping this

function, as it did in Lochner and as we think it did in Roe, it is time to change course.

CONCLUSION

Respondents ask the Court to reverse the Court of Appeals' judgment that the Act's spousal notice provisions are unconstitutional, and in all other respects to affirm the judgment of the Court of Appeals.

Respectfully submitted,

ERNEST D. PREATE, JR.
Attorney General

BY: JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section
Counsel of Record

KATE L. MERSHIMER
Senior Deputy Attorney General

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471